No. 12211

In the
United States Court of Appeals
For the Ninth Circuit

EVERT L. HAGAN, doing business as EL REY CHEESE CO.,
Appellant,
vs.
CENTRAL AVENUE DAIRY, INC.,
Appellee.

Appellant's Reply Brief

EVERT L. HAGAN,
115 N. Eastern Avenue,
Los Angeles 22, Calif.,
In Pro Per.

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

Cases

Codes, Statutes, Textbooks

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PREFACE

The facts having been fully set forth in the former briefs filed herein, little could be added by further statements here. However, we take sharp issue with the statement contained on page 4 of appellant's brief in which it is stated:

> "It is to be noted that Central Avenue Dairy, Inc., would be entitled to said deposit if Hagan breached his contract, but the breach of contract by Central Avenue Dairy, Inc., would not effect the rights of either to the deposit."

for the reason that neither claimant could have sustained their claim to the fund deposited by the plaintiff in interpleader as against the other without first establishing a breach of the contract pursuant to which the funds originally were deposited with the plaintiff in interpleader. It therefore necessarily follows that a breach of the contract by either claimant would effect the right of all parties concerned. The defendant Central Avenue Dairy, Inc., by its failure to appear and answer the claim of the defendant, Evert L. Hagan, to the fund or set forth its claim thereto is deemed to have admitted its breach of the contract, which substantiated the defendant, Evert L. Hagan's claim.

Moreover, appellee throughout its brief, urges the court to accept the narrowest possible interpretation concerning the act governing the procedure for Federal District Courts and the limitation of their jurisdiction in matters relating to a cross claim filed by one defendant in an action in interpleader against a co-defendant in the same action, who had been properly served by the marshal in the district wherein such defendant resides, with a copy of the complaint and summons as provided by rule 4F.

Such interpretation does not appear to be logical nor within the intent of Congress at the time of the enactment of the rule of Federal Procedure if we bear in mind that the purpose of this enactment is to afford all parties the right to litigate all matters relating to the transaction or occurrence that is the subject mat-

ter and germane to the original action, thus permitting justice between all parties respecting all issues in a single suit and without the necessity of seeking additional relief in two or more jurisdictions throughout the several states.

It may be well to note that the act referred to was amended in 1936 giving to the Federal Courts jurisdiction to serve process in interpleader suits beyond its respective districts, but prior to this amendment it was the general rule that one claimant had the right to cross claim against another claimant in the same proceeding over the amount of the original stake. This fact must be presumed to have been within knowledge of and considered by the Congress at the time of the enactment—therefore Congress must have intended to give full jurisdiction to district courts to enable them to fully settle the entire controversy between all parties coming before it in actions in interpleader—otherwise such limitations would have been expressly reserved. In further support of what we have said we call attention to the modern trend of both the Congress and the Courts to permit all parties concerned to fully litigate all differences between them in one single action and to avoid a multiplicity of actions where the same subject matter is involved.

I.

SECTION 2361 OF REVISED TITLE 28 U. S. C. A. DOES AUTHORIZE AND WARRANT THE SERVICE OUTSIDE THE STATE IN WHICH THE DISTRICT COURT IS HELD OF A CROSS COMPLAINT FILED BY A DEFENDANT IN AN INTERPLEADER ACTION AGAINST A CO-DEFENDANT WHERE PERSONAL JUDGMENT FOR DAMAGES IS SOUGHT BY SUCH CROSS COMPLAINANT.

The questions covered in Point I of Appellee's Brief is essentially an objection to the jurisdiction of the District Court to entertain appellant's cross complaint against his co-complainant Central Avenue Dairy, Inc., with almost complete reliance being placed upon the authority contained in *Stitzel Weller Dist., Inc., v. Hartman,* 39 Fed. Supp. 182, therein cited but an examination of the same does not disclose that the non-resident ddefendants named in the cross complaints were named in, made defendants to, or served by a copy of the summons and complaint in the original interpleader action. It could reasonably have been that claimants, Norman and Hartman, attempted to join the remaining parties referred to by the court as co-defendants in the cross complaint only, and we notice further that this case was decided without reference to the new rules of Federal Procedure and particularly Rule 13G which we here quote:

> "A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter claim, therein, or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is, or may be liable to the cross claimant for all or part of a claim asserted in the action against the claimant."

which distinguishes the authorities cited with the instant cause as here, Defendant Central Avenue Dairy, Inc., was named and served as a defendant and jurisdiction was obtained over him by service of a copy of the complaint and summons in the original interpleader action. But whichever way the true facts may be in the *Stitzel* case, supra, a later case, *Bank of Neosho v. Calcord et al.,* 8 F. R. D. 621, decided Feb. 4, 1949 by the United States District Court in Missouri which cites and distinguishes the *Stitzel* case would appear to supercede the former upon sound logic and the application of Rule 13G of the Federal Rules of Procedure. In the latter case which was an interpleader action wherein the plaintiff was stake-holder of $5000 given to secure the performance of a contract for the sale of land. The purchasers and the sellers were residents of Illinois and Oklahoma respectively. The stakeholder was a resident of Missouri. The seller refused to perform and the stakeholder, desiring to rid himself of the fund, filed an action in strict interpleader. The purchaser in addition to their claim upon the fund

sought to cross claim for specific performance of the contract of sale. The sellers moved to strike the cross claim for the reason that the Federal District Court had obtained no jurisdiction over them for the adjudication of anything other than the right to the stake in interpleader. The Court held:

1. Rule 22 Federal Rules of Procedure provided that interpleader actions were governed by the Federal Rules of Procedure.
2. That the provisions of Rule 22 made Rule 13G determinative of the issues on the motion to dismiss the cross claim.
3. That rule 13G gave the court jurisdiction to determine all of the issues arising out of the subject matter of the interpleader.
4. That the tendency of modern jurisprudence was to dispose of all issues germane to the controversy at hand and to prohibit multiplicity of actions.
5. That the *Stitzel Weller* case was not determinative of the motion before it because it was decided without reference to Rule 13G.
6. That the jurisdiction in an interpleader action is general and gives the court power to determine all germane issues regardless of the residence of the claimants in the interpleader, the court having obtained proper jurisdiction in the original interpleader action, and the cross claim before it arises out of the subject of the interpleader and should be heard.

The authorities cited appear to be substantiated by the greater weight of authority and we further submit that the court having acquired jurisdiction under and pursuant to Section 39C of the statute is released of the restriction to the effect that service outside the state in which the court is located would be without effect.

The aforementioned section provides that a corporation may be sued in any judicial district court in which it is incorporated or licensed to do business or is doing business and such judicial district court shall be recorded as the residence of such corporation for venue purposes.

By the affidavit of Ed A. Geare, President of Central Avenue Dairy, Inc., (Tr. 38) he admits that the transaction herein referred to constituted interstate business. And Exhibit A (Tr. 23) attached to the answer, claim and cross complaint of defendant, Evert L. Hagan, establishes that such business was transacted in both the states of California and Arizona—also by the terms of Exhibit A all shipments of products were to be made by Central Avenue Dairy, Inc., from the state of Arizona to Evert L. Hagan in California—thus the venue of this action is established to be properly placed in the District Court where the interpleader was originally filed.

Also Section 2361 of the statute providing that in any interpleader action the District Court may issue its process for all claimants and that such process shall

be addressed to and served by the United States Marshal for the respective districts wherein the claimants reside or may be found—also that said district court shall hear and determine the case and may discharge the plaintiff from further liability, make the injunction permanent and make all appropriate orders to enforce the injunction. Thus it appears that the district court had jurisdiction under the aforementioned authorities to try and determine all of the issues presented by the cross claim.

In the case of *United States ex rel. Foster Wheeler Corp. v. American Surety Co.,* 25 Fed. Supp. 700, it was held that when a counter-claim arises out of the same transaction as the main action it must be set up and the court has jurisdiction even though it would not have had jurisdiction if the counter-claim were set forth in an independent suit.

Rule 4F provides that all process other than subpoena, may be when a statute of the United States so provides, served beyond the territorial limits of the state in which the district court is located. The statute herein cited does so provide establishing jurisdiction of that court over the defendant Central Avenue Dairy Co., Inc.

In the case of *Equitable Society of the U. S.,* 42 Fed. Supp. 1022, it is held that the defendants have waived the question as to which one of them should be designated as plaintiff in the interpleader, and that such defendant occupies the position of plaintiff and

must state his own claims and answer that of the other. To the same effect see also *Security Tr. Co. v. Woodworth,* 76 Fed. Supp. 671.

It would appear from the foregoing that in order to arrive at a correct decision in this case, rules of statutory construction should be followed as a guide for which the following may be used as an example.

All laws should receive a sensible construction and general terms should be so limited in application as not to lead to injustice, oppression or absurdity. *U. S. v. Kirby,* 74 U. S. 482, 19 L. Ed. 278. The language of a statute must be given reasonable meaning in the light of generally accepted principles of law. *Safe Dep. & Tr. Co. of Baltimore v. Tait,* 3 Fed. Supp. 562.

A phrase which through judicial interpretation has a fixed meaning when bodily incorporated in a statute will be given that meaning in the statute unless a contrary intention appears. *Re Abbotsford,* 98 U. S. 440, 25 L. Ed. 168; *U. S. v. Jones,* 3 Wash. D. C. 209, and that the courts in construing the interpleader act must construe it liberally. *Hancock Mutual Life Ins. Co. v. Kegan,* 22 Fed. Supp. 326; *Metropolitan Life Ins. Co. v. Segaritis,* 20 Fed. Supp. 739.

II.

A SUMMONS ATTACHED TO THE CROSS CLAIM WHEN SERVED IN THE INSTANT CAUSE WAS NOT NECESSARY.

Appellee's contention discussed under Point II of its brief would be tenable only by applying California law to the instant case. However, their error lies in attempting to apply California law because the premise upon which they seek to apply state laws arises pursuant to Rule 5A which in part provides that process made upon parties in default for failure to appear as to new or additional claims for relief against them shall be served upon them in the manner provided for the service of summons in Rule 4 of the Rules on Civil Procedure. Rule 4, Subdivision (B)(7) provides that service upon a defendant such as Central Avenue Dairy, Inc., is sufficient if the summons and complaint are served in the manner prescribed by the laws of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. It thus appears that the law applicable to the questions raised by appellees is that of the State of Arizona instead of the State of California. And the law of the state of Arizona respecting the service of cross complaints does not contain any provision similar to Section 442 of the California Code of Civil Procedure to the effect that if any of the parties affected by the cross complaint have not ap-

peared in the action, a summons upon the cross complaint must be issued and served upon them, in the same manner as upon the commencement of the original action. The Arizona law respecting cross complaints to which we referred are contained in section 21-437 of the Arizona Code of Civil Procedure in superior courts and provides:

> "Sec. 21-437 COMPULSORY COUNTER CLAIMS. A pleading shall state as a counterclaim any claim not the subject of a pending action which at the time of filing the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, and
>
> Sec. 21-433 CROSS CLAIM AGAINST CO-PARTIES. A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter, either of the original action or of a counter claim thereon. Such cross claim must include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of the claim asserted in the action against the cross complainant."

It necessarily follows that since the appellant's cross claim arose out of the same transaction or occurrence, that is the subject matter and germane to the opposing parties' claim, it must be asserted at the time

of the answer or not at all. That the service upon Central Avenue Dairy, Inc., should be as provided in Section 21-313 and Section 21-305 of said Code, which provides that in actions against a corporation the summons may be served on the President, Secretary or Treasurer or any director thereof, or upon any agent appointed for that purpose, or by leaving a copy of the same at the principal office of the company during business hours. No provision contained in the Arizona code provides for the issuance of summons on a cross claim.

Service of Central Avenue Dairy, Inc., was entirely consistent with the Arizona statutes, so far as applicable, and consistent with the statutes of the U. S. respecting rules of civil procedure in district courts. (Rule 4-1.) And as further authority concerning this point, in Simpkins Federal Practice 3rd Ed. Sec. 320 page 301 we find the following:

> "A cross claim may be served upon a co-party by serving it upon the attorney representing such co-party unless service upon the party himself is ordered by the court." (Citing Rule 5B and 5C.)

New summons is not necessary. (Citing Rule 4A and 4D.) The marshal's return of service showing service on Central Avenue Dairy, Inc., of a copy of the cross complaint (Tr. 30) was in due form as affecting service on it by serving the duly authorized agent appointed for that purpose, and under Rule 4 the service of the original complaint and summons has been prop-

erly made and the court already has jurisdiction over the person, regardless of the fact of his appearance or non-appearance, and the court should be allowed to exercise that jurisdiction in connection with anything relating to the case and arising because of it. It, therefore, appears to be the logical meaning of the rule to permit complete justice between the parties without compelling them to settle their disputes concerning a single subject matter in two or more suits in different jurisdictions.

The remaining points discussed in appellee's brief have been fully met in our opening brief and we therefore conclude.

CONCLUSION

1. That under the general law of interpleader prior to 1936 one claimant could properly cross claim against another claimant.

2. When Congress passed the interpleader act of 1936 giving district courts power to issue process throughout the United States in interpleader actions, it must have conferred general jurisdiction in interpleader actions—and to hold otherwise would violate all rules of construction and arrive at an unjust and absurd result.

3. That no summons was necessary to be issued in order to bring the Central Central Avenue Dairy, Inc., properly before the court; and,

4. That under the authority of Rule 13G and the case of *Bank of Neosho v. Calcord, supra,* the district court in Los Angeles had jurisdiction and should have entertained the cross claim.

Respectfully submitted,

EVERT L. HAGAN,
In Pro Per.